

ARNOLD & PORTER

October 3, 1980

CONFIDENTIAL AND PRIVILEGED

MEMORANDUM

TO: Tom Ahrensfield
FROM: Abe Krash and Jerome I. Chapman
RE: Philip Morris — Barclay

The many discussions we have had during the past several weeks regarding Barclay lead us to present the following conclusions and recommendations for your consideration.

Assuming, for purposes of discussion, that the Barclay filter is a "fraud" — i.e., because of the construction of the filter, the cigarette functions in a radically different fashion in the mouth of a smoker than it functions on the smoking machine, and that Barclay can be shown to be significantly different in this respect than all other cigarettes — there arise two substantial technical questions and a number of serious policy issues.

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1. Technical Questions

First, it is essential that Philip Morris technicians develop concrete demonstrable proof of the way in which the Barclay filter functions differently when smoked by a human than by a machine, and that Barclay is markedly different in this respect than all other cigarettes presently on the market. Any hope of persuading other elements in the industry that the product is a potential danger to the industry rests on the ability to make a clear cut demonstration that the deviation between the smoker's tar intake and the tar measured by the machine is substantially greater than that which exists in the case of every other cigarette. Specifically, the company must develop evidence of a quality which will satisfy impartial, objective observers that Cliff Goldschmidt's hypothesis concerning the Barclay filter is valid.

Second, we also need a determination of the methods available for more accurately measuring on a smoking machine the tar produced by Barclay. At one time, it was suggested that the use of the European-type dental

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dam, which squeezes the tip of the filter more tightly in the smoking machine, would provide a truer reading of the tar delivery of the Barclay brand when tested on the machine. Has Philip Morris tried the European-type dental dam with the Barclay filter and, if so, with what results? If this particular change in the dental dam does not cure the incongruity between smoking machine results and actual smoking practices, then the company's technicians must come up with a proposal which will cure the defect.

Stated another way, the problem with Barclay appears to be that the cigarette, when tested under the current FTC smoking machine protocol, produces an ultra low tar reading, but advertising the brand as a 1 mg. tar cigarette would be deceptive because, in fact, the tar delivery to a human smoker is significantly higher. There are three ways of eliminating the resulting deception: (i) take the brand off the market; (ii) change the smoking machine testing procedure and accurately report the test results; or (iii) adequately disclose the problem in all advertising. If Brown & Williamson is unwilling to take

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the brand off the market or to disclose the problem in advertising, then the burden falls upon the Philip Morris research and development people to devise an acceptable means of modifying the FTC's testing procedures.

2. Policy Questions

Assuming that the foregoing technical matters are reasonably resolved, we see three significant policy issues:

First, should an effort be made to convince B & W that the product entails unreasonable risks for the industry in terms of governmental relations and product liability exposure? We do not perceive that there would be any harm — and it may well be worthwhile — to seek to demonstrate to Messrs. Kornegay and Temko that Barclay threatens to raise serious and substantial industry problems. The present FTC tar reporting procedure is, after all, a product of discussions among all of the companies leading to a joint agreement with the FTC, and all of the companies have a common and legitimate interest in issues of tort liability relating to smoking. It is

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possible that, if convinced, Messrs. Kornegay and Temko would communicate these concerns to B & W. We are not sanguine, however, that Messrs. Kornegay and Temko would take any action, and we are even more doubtful that they would succeed in persuading B & W to take appropriate measures. The chances of success in this attempt are, we believe, directly related to the substantiality and clarity of any technical demonstration that can be developed, to prove the mischievous character of the product.

Second, should Philip Morris approach the Federal Trade Commission either unilaterally or together with other companies? Assuming, as we do, that B & W is unwilling to seek an FTC clearance for its advertising campaign for Barclay, we think Philip Morris should be extremely hesitant to involve the FTC in this matter except in the context of revisions of the testing procedure.

If a reasonably simple technical adjustment to the smoking machine or the testing procedure can be developed which will overcome the problem presented by the Barclay filter, then we believe it may be worthwhile

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to propose this modification to the FTC at a low, technical staff level. We think it would be worthwhile preliminarily to attempt to have the industry as a whole agree upon the desirability of such a technical change and then to have a joint presentation made to the FTC laboratory staff through the usual industry channels. Obviously, the predicate for the approach is a well-tested and documented proposal to modify the smoking procedure.

We do not exclude the possibility of Philip Morris' unilaterally approaching the FTC technical staff people with a proposal that the testing procedure be revised. Such an approach is likely to be less successful than a joint industry approach since it would be suspect as prompted by competitive motives.

Conceivably, Philip Morris could register a complaint with the FTC and seek to have the agency institute a proceeding — or at least threaten to bring a complaint — against B & W for deceptive advertising. The principal difficulty with this proposal is the historic sluggishness

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of the FTC. It is improbable that we would get any clear signal from the agency one way or the other within a reasonably short period of time. If the Commission promptly attacked Barclay, we could probably wait out the results. If the Commission promptly determined not to attack, Philip Morris could probably feel reasonably free to introduce a product with a similar type filter. The more likely scenario, however, is that we would be left hanging in a void for a protracted period of time and — worse yet — we would have gone on record as believing that the product is deceptive, thus seriously inhibiting Philip Morris' ability to market a comparable cigarette.

There is another alternative: It would be possible for us to ask the FTC for preclearance of a Multifilter campaign paralleling the Barclay ads, in the hope that the FTC would either clear or kill such advertising for all companies. But this would not obviate the problem of delay, and Philip Morris would still be impeded from marketing its own brand while the matter was under consideration at the agency. Moreover, there would be a risk of

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a negative ruling as to Multifilter and no ruling as to Barclay, resulting in a competitive advantage for B & W.

It merits emphasis that there are dangers in any approach to the FTC. We cannot be certain that any inquiry or action by the Commission would be confined to the issues raised by the Barclay filter. It is possible that raising this issue would lead to a general re-examination of tar reporting, advertising, and package labeling, and that such actions would not be in the interest of Philip Morris or the industry generally. This risk is present to some extent even in a discussion with lower level FTC technical personnel. It may be worth taking this risk if such discussions would lead to more accurate reporting of Barclay's tar yield. This would be to the competitive interest of Philip Morris, and it would be in the interest of the industry generally.

Accordingly, except on the issue of technical adjustments to the smoking machine, we believe any contact with the FTC at this stage would be inadvisable.

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Third, is there any form of self-help that Philip Morris can undertake? There may be various ways in which Philip Morris could advertise its own Barclay-type brand — presumably, Multifilter — in a manner which could (i) eliminate any deception by full and accurate disclosure, or (ii) demonstrate that Barclay is deceptive and thereby weaken its marketing position.

We are in the midst of a study concerning the disclosures in advertising that might be necessary. On the premise that the Barclay filter works radically differently in the mouth of the smoker than on the machine, so that the statement that the product delivers 1 mg. of tar would be deceptively incomplete, a qualifying statement may be necessary to obviate a claim of deceptive advertising.

It may be desirable to explore with Philip Morris marketing people their ability to market a cigarette with a full disclosure of the significant variation of actual smoking experience from the measurements obtainable from the smoking machine.

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Whatever form of disclosure is decided upon, it must be recognized that the disclosure itself may draw the attention of the FTC and other antismoking forces. With that in mind, we should consider the desirability of including the disclosure decided upon, and the reasons for it. We would recommend against seeking an advance clearance from the FTC. But we may wish to discuss our campaign with the Commission staff shortly after its initiation. The rationale for doing this would be that it is almost inevitable that the matter would come to the Commission's attention in any event, and we might blunt their interest by making a clear presentation of the reasonableness of what we are doing at the outset. The difficulty with this position is that the Commission is notoriously suspicious and mistrustful of the cigarette companies and may very well not accept our position. If we bring the matter ourselves to the Commission's attention, we may thereby force them to take a negative position; whereas, if we let matters drift, the Commission may take no action at all. On balance, we think it prudent

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. to stay away from the FTC (except for a low-key approach to FTC technicians on the issue of tar testing). If Philip Morris has an advertising campaign for which we can muster solid arguments, it should go forward and the company should be prepared promptly to respond to inquiries about the campaign.

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